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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1134

STATE OF MONTANA, ET AL.,

Appellants,

— against —

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF ON BEHALF OF THE STATE OF NEW YORK AS AMICUS CURIAE OF APPELLANTS

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TABLE OF CONTENTS

Page

Interest of the Amicus Curiae 1

Opinion Below 2

Constitutional Provisions and Statute Involved 2

Question Presented 3

Statement 3

ARGUMENT — Montana's public contractors' gross receipts tax does not violate the supremacy clause of the United States Constitution 4

CONCLUSION — The judgment of the three-judge district court for the District of Montana should be reversed and a judgment upholding the constitutionality of the Montana revised gross receipts tax entered 7

Table of Cases:

Alabama v. *King and Boozer,* 314 U.S. 1, 1941 6

Carmichael v. *Southern Coal Company,* 301 U.S. 495 [1936] 5

James Dravo Contracting, 302 U.S. 134, 1937 6

Peter Kiewit Sons' Co. v. *State Board of Equalization,* 161 Mont. 140, 505 P. 2d 102 [1973] 5, 6

United States v. *Boyd,* 378 U.S. 39, 1964 6

United States v. *County of Fresno,* 1977, 429 U.S. 452 ... 6

Statutes Cited:

Montana's Gross Receipts Tax, Chapter 35, Title 84 3

United States Constitution, Article VI, Clause 2 2

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Interest of the Amicus Curiae

The United States of America by seeking declaratory and injunctive relief against the enforcement of Montana's gross receipts tax, Chapter 35, Title 84, Revised Codes of Montana, 1947, as amended in 1967, challenges long standing interpretations of the law upholding the constitutionality of statutes under which New York State and other states have collected taxes from contractors who deal with the federal government. The opinion of the Court below (the three-judge United States District Court for the District of Montana, Helena Division) is

an incursion on the taxing power of States as this Court, in its previous decisions has announced and interpreted that power. This brief is filed in support of the constitutionality of Montana's gross receipts tax in accordance with Rule 42 of the Court.

Opinion Below

The opinion of the three-judge district court for the District of Montana, Helena Division, is reported at 437 F. Supp. 355 (1977). The opinion of the three-judge district court held Montana's gross receipts tax to be in violation of the supremacy clause of the United States Constitution. Judge EAST, writing for the majority said (p. 359):

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G.R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G.R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G.R. Tax and gets no return of the overplus of approximately 50 percent."

Constitutional Provisions and Statute Involved

United States Constitution, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Montana's public contractors' gross receipts tax, Chapter 35, Title 84 of the Revised Codes of Montana, 1947, as amended, is lengthy and is set forth in full in Appellants' Jurisdictional Statement at page 38, *et seq.* It is summarized as follows:

> The tax is a levy of one percent of the gross receipts earned by public contractors within the State of Montana. The tax is levied on the contractor and not on the public agency. A public contractor is defined as any person performing a contract for the State of Montana or any other public body, including the federal government. The act provides for a system of refunds and credits, whereby a contractor can receive a cash refund for personal property taxes, or a credit for any corporate income taxes. The tax is levied on all public contractors and makes no distinction, as to the state of incorporation or principal place of business. During the years of the operation of the tax, it has resulted in revenue being generated for the State of Montana, equal to one-half of the amount of the tax collected--*i.e.* effective tax of 1/2 percent.

Question Presented

While several issues are raised in the appellants' brief, this brief is limited solely to the question of whether or not Chapter 35, Title 84 of the Revised Codes of Montana, 1974, as amended in 1967, as applied to contractors dealing with the Federal government violates the supremacy clause in Article VI, Clause 2 of the United States Constitution.

Statement

The United States brought this action in the United States District Court for the District of Montana in April, 1971 against the State of Montana, its Department of Revenue and its Director of Revenue. It sought, *inter alia*, (1) a declaratory judgment that the imposition of the gross receipts tax upon the United States, its contractors, subcontractors or those with whom it dealt violated the Supremacy Clause of the United States Constitution, (2) a permanent injunction against

imposing the tax on those persons, and (3) a refund of the taxes collected from those persons (Appellants' Appendix, pp. 9-17).

Prior to 1971, the Federal government contractually required its contractors within the State of Montana not to take advantage of the refund provisions and credits provided for in Montana's public contractors gross receipts tax. However, since 1971, the Federal government's contracts, as those involved here, required the contractors to take advantage of all refunds and credits provided for in the gross receipts tax and to reimburse the Federal government in the amount of them. The Court below granted the relief requested by the Federal government. The majority of the Court held that because revenues from the gross receipts tax went to the State of Montana and not to the Federal government, Montana was treating itself better than the Federal government.

ARGUMENT

MONTANA'S PUBLIC CONTRACTORS' GROSS RECEIPTS TAX DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

In the exercise of its power to tax a State is free to select the subjects of taxation and to grant exemptions. No recent rule of equality of taxation is imposed by either due process or equal protection. Inequalities which result from a single use of one particular class for taxation or exemption infringe no constitutional limitation. State Legislatures are not bound to tax every member of a class or none. They may make distinctions of degree which have a rational basis. The distinctions are presumed to rest on a proper basis if there are any conceivable state of facts which could support them. Legislatures are not required to list a complete catalogue of the considerations which move its members to enact tax laws. In the absence of such a record courts cannot assume that a legislative action is capricious or that with its knowledge of local

conditions which the legislation is to be applied a Legislature was not aware of facts which afford a reasonable basis for action. Administrative convenience and the collection or measurement of a tax alone affords a sufficient justification of a different treatment of taxpayers. Where a public interest is served one business may be taxed and another untaxed. These principles have been long established (*Carmichael* v. *Southern Coal Company*, 301 U.S. 495 [1936]).

Montana's public contractors licensing gross receipts tax, Chapter 35, Title 84, Revised Codes of Montana, 1947, as amended by the Montana Legislature in 1967, was a revenue enforcing measure which was enacted in an attempt to require some of the contractors working in the State of Montana to meet their tax responsibilities. The Montana Legislature enacted the statute to work out a solution to the problem of contractors in paying their taxes. The Supreme Court of Montana labeled the act as a legislative "revenue enforcing measure designed to operate hand in hand with [the State's] long-standing personal property tax and income tax, to ensure more effective tax collection and reduce tax avoidance." (*Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 [1973].) It does not appear from the decisions below that Montana had as an important tax collection problem with private contractors *vis-a-vis*, public contractors. This fact would seem to justify the imposition of a public contractors' gross receipts tax.

The statute by its terms makes no distinction between contractors dealing with the Federal government and those dealing with the State of Montana and municipal corporations within the State. Any discrimination against the Federal government prior to 1971 was caused by the Federal government inserting a clause in some of its Federal contracts which prohibits a contractor from taking advantage of the refunds and credits available to them under the statute. In 1971 the Federal government no longer required the insertion of such a

clause in its contracts but required contractors to take advantage of all refunds and credits provided for in Montana's gross receipts tax and to reimburse the Federal government for them. It does not appear that the Federal Government was required to prevent its contractors from taking advantage of the credits available to them under the gross receipts tax of any kind. The injury resulting to the fisc of the United States was self-inflicting and resulted from the actions of the voluntary actions of its own agencies and employees and inserting the clause in some of the construction contracts.

The gross receipts tax is not a tax imposed upon the Federal government or any of its agencies. The tax is imposed only on contractors who deal with the State of Montana, its county or municipal governments and school districts and the Federal government. The question of whether the statute was imposed on contractors or upon the State of Montana, its subdivisions or the Federal government is a question of State law on which the Supreme Court of Montana can and did speak with final authority. The Supreme Court of Montana has held that the tax is imposed upon the contractor. (See, *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 [1973].) The fact that the Federal government ultimately paid the tax in this case, as part of its construction costs, does not cause the tax to fall within constitutional prohibitions against its imposition. This Court stated recently in *United States* v. *County of Fresno*, 1977, 429 U.S. 452 at p. 462:

> "The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State."

See also, *United States* v. *Boyd*, 378 U.S. 39, 1964, *Alabama* v. *King and Boozer*, 314 U.S. 1, 1941; *James Dravo Contracting*, 302 U.S. 134, 1937. A contrary rule would invalidate various excise taxes imposed by the Tax Law of the State of

New York as well as other states such as sales and motor fuel taxes which are collected from contractors who work on projects for the Federal government.

CONCLUSION

THE JUDGMENT OF THE THREE-JUDGE DISTRICT COURT FOR THE DISTRICT OF MONTANA SHOULD BE REVERSED AND A JUDGMENT UPHOLDING THE CONSTITUTIONALITY OF THE MONTANA REVISED GROSS RECEIPTS TAX ENTERED.

Dated:

Respectfully submitted,

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